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Governance and Law: The Distinctive Context of Transitions from Conflict and its Consequences for Development Interventions



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Executive Summary

This briefing paper focuses on the relationship of law to governance, in fragile and conflict-affected states that are attempting to transition from violent protracted social conflict. The paper is intended to set out a broad conceptual framework of the relationship between law and governance as it relates to peacebuilding attempts to reconstruct governance post-conflict. The paper draws on and provides a guide to relevant research which provided the underpinning of the Political Settlements Research Programme, and is being developed under its auspices by a consortium of five organisations (www.politicalsettlements.org).

This briefing paper sits alongside a second briefing paper on law and governance (O'Rourke, Briefing Paper 5, 2015 <http://www.politicalsettlements.org/research/briefing-notes/>) focusing on the case study of women's social mobilisation which illustrates many of the relationships set out below.

1. Our Framing understandings.

The following are the understandings from the political settlement research programme which frame the briefing note.

- a. **Law.** We understand law in a socio-legal sense as an area which has some autonomy from politics as normally understood, but which is closely shaped by and shapes the political and social contexts in which it operates. Our interest is in understanding the social effects of law on the political sphere, and our socio-legal approach extends to trying to use socio-legal methodology for understanding the role and effects of law socially.
- b. **International and domestic law.** We also understand law as operating in two different registers and sites, which are increasingly intermingled: international law as found in both hard (e.g. treaty) and soft (e.g. guidelines) forms as an inter-state commitment, but commitments which increasingly seek to impact on the internal make-up of the state; and domestic law where constitutional frameworks provide the entire foundation for formal governance arrangements, but which also often



appeal to universal ideals. However, these two registers are now as this briefing note point out, increasingly intermingled.

- c. **Political settlements and peace processes.** We also contend that the relationship of law to governance has a specific context in countries attempting to transition from conflict, and it is this context that we address in this briefing paper. In countries attempting structured peace processes and transitions, often three types of transition are attempted simultaneously in a fairly short timescale which lead to a distinctive set of dilemmas and problems for law, rule of law, and governance:

- a transition from war to peace
- a transition from exclusive political settlements to more inclusive ones with a new configuration of elite power and sometimes accentuated roles for civil society
- an economic transition

2. Conceptualising the link between law and governance in general terms. Law and governance are closely linked in the following ways.

- a. Constitutions provide the framework for the legal and political institutions through which government takes place. They provide:
- legal ‘power-maps’ for how power will be held and exercised
 - a legal framework for accountability, often enforceable by apex courts
 - a legalised text which embodies the underlying political settlement or elite-level pact from which any political community flows
 - rights and safeguards for individuals from abuses of power by political actors and institutions
- b. Public institutions of governance are themselves also creatures of law, operating according to law and sometimes even having secondary law-making functions.
- c. Good government depends on a legal platform of both criminal law and civil law, to create the environment – here law’s key role is to provide background norms that enable horizontal interactions.
- d. International law increasingly impacts on, and increasingly even regulates governance at the state level. This regulation is diverse and multifarious, including:
- International legal regulation of political change processes (including peace settlements, coup d’état, or other forms of regime change), which attempts to ensure only ‘democratic’ regime change

- International legal requirements for human rights to be protected at the domestic level. Human rights directly impact on the internal governance arrangements of states
- International legal requirements for 'inclusion' both in change processes and in the terms of the new political settlement itself
- A range of diverse international bodies shape domestic governance in what have been termed 'transnational global administrative spaces' which impact on domestic governance (see for example, Venice Commission of Council of Europe which now acts (when requested) well beyond Europe in giving opinions on constitutions)

3. The distinctiveness of the law-governance relationship in conflict-affected states

We suggest that the relationship between law and governance is distinctive in conflict and post-conflict settings.

- e. Law is often deeply implicated in conflict. An exclusive political settlement means that institutions of law and governance are often understood as 'owned' by one side in the conflict, and as a tool of conflict. Conflicts are often dealt with through emergency law regimes and tweaked criminal law, denial of human rights is often a cause and a symptom of conflict and legal institutions are not understood as autonomous from those they are supposed to hold to account. As a result:
 - Law and legal institutions as themselves needing rehabilitated post-conflict: law as both subject and object of change. Policing functions need to be separated from army functions, discriminatory laws need repealed, and respect for rule of law needs to be built
 - A new concept of 'shared ownership' of governance institutions and particularly justice institutions needs to be instituted post-conflict with wholesale reform of criminal justice, the judiciary and the police and security services to ensure equal representation of previously excluded groups
 - International law tends to play a heightened role both during conflict and in post-conflict settings, because it offers 'neutral' benchmarking standards that are independent to any of the parties to the conflict. Also, even the most rights-denying governments have often formally signed up to international human rights standards which therefore have some traction
 - Those outside both the conflict political settlement, but also the brokered peace agreement's political settlement, often use appeals to norms and in particular international legal norms to demand inclusion in peace-making and constitution-making processes, and to demand certain substantive outcomes from the new

governance arrangements (for example – provision of equality, or prohibition of impunity)

- International norms also have become a focal point for transnational mobilisation of civil society and so using these norms for domestic lobbying brings an element of outside resource to marginalised civil society groups, by which they can increase their influence

4. Unusual legal institutions. As a result of these conditions post-conflict and transitional settings often have unusual legal phenomenon (and unusual governance structures) which pose a distinctive set of challenges. These can include:

- a. Off-the-peg criminal codes (East Timor, Kosovo) and internationalise domestic law with little local expertise.
- b. International involvement in domestic legal institutions (e.g. international judges on Apex courts (Bosnia, Philippines), international law enforcers (IFOR in Bosnia), international or hybrid criminal courts (Rwanda, former Yugoslavia, Sierra Leone).
- c. Interim Constitutions – often operating bearing a burden of providing a coherent power-map while also operating as peace agreements with a heavy conflict resolution ambition. These attempt to pave the way for more permanent Constitutions (sometimes successfully sometimes not). See Interim Constitution Report.
- d. Multiple and overlapping legal structures which are not always coherent as a whole, but which reflect important negotiation dynamics: for example, overlaid human rights institutions (state, regional, human rights chambers and ombudsmen whose functions and remit are not always distinct), or multiple mechanisms to deal with the past with overlapping mandates (see Sierra Leone Truth and Reconciliation Commission and the Sierra Leone Special Criminal Court).
- e. Rapid institutional development with a wide range of simultaneous reform projects, leading to ‘consultation fatigue’ and depletion of civil society as staff shift from non-governmental to governmental spheres.
- f. Truth commissions or other legal mechanisms to deal with the past, which operate for time-limited periods and have complicated relationships with ‘ordinary’ legal institutions such as courts and police.
- g. Courts, police and other mechanisms often also becoming vehicles for parties and civil society to press claims as to accountability for the conflict, in ways which distort these institutions from more ‘normal’ functions.

5. Unusual governance. This unusual legal institutional patterning is coupled with unusual governance arrangements. These include, notably complex power-sharing arrangements which attempt to create a new political settlement – that is a new framework for power among elites. Whereas governance arrangements in settled contexts assume a) an agreed political community, (b) an agreed territory and (c) an agreed set of governance institutions which flow from the agreed political community, often post-conflict there is very little agreement to any of these things. Accordingly institutional forms are designed that attempt to encapsulate a very low-level agreement to ‘agree to disagree’ and to use shared institutions to continue to work out that disagreement. This leads to a number of distinctive governance dilemmas:

- a. How to reconcile commitments to elite inclusion to commitments to rule of law and wider forms of participation (including when and who to amnesty for past atrocities).
- b. How to work complex conceptual and territorial divisions of power, that aim for forms of power-dividing, that often cut across traditional thinking as to how best to achieve effective and efficient government. These often include forms of veto.
- c. How to ensure that non-elites or other marginalised groups are included in governance structures whose main aim is to accommodate the conflict’s protagonists.
- d. How to reckon with informal power structures that often continue through the transition in fairly invisible ways, that have capacity to subvert the ostensible commitments to good government and peaceful co-existence.
- e. Navigating the relationship between law and governance in the midst of what are complex attempts to construct a new political settlement in a short period of time through a structured internationalised peace process.

6. Significant controlling factors. Based on our research, the following factors we suggest are critical to distinguishing between post-conflict settings, and the complexity of the reconstructive task:

- a. Whether the post-conflict state had some past background as a rule of law state. Such a backdrop makes the task somewhat easier than where legal and political institutions for good governance are being constructed with little recent past history of these institutions having functioned coherently.
- b. The scale of the conflict, and in particular whether any human capacity for law and legal institutions exists. If, for example, the scale of the conflict means that judiciary have fled the country, police are not in place, and prisons are not operating normally, then the task of reconstruction is harder.

- c. The balance of power between the conflict parties. If one party remains more powerful, they may have capacity to prevent or destabilise proposed reforms. Similarly, however, a balance of power in which each side can essentially veto the other side's proposed changes, can frustrate progress. The point remains: the balance of power is important to what can be achieved.
- d. The strength and capacity of civil society. A robust and informed civil society can make a real difference in bringing knowledge as to what types of accountability mechanisms are needed to address grievances on the ground, and in anticipating how parties may want to resist change.
- e. Past institutional history and experience. Past institutional history and experience is important to local senses of what can be made work and what has been tried and discredited.
- f. The scale of internationalisation and commitment to resources and 'monitoring' that internationals bring.
- g. The regional human rights system, which may play a role in adjudicating on various aspects of the transitional governance arrangements (e.g. amnesty provision)

7. Challenges for development support. The following persistent problems appear in the literature in this area:

- a. The complex task of establishing 'legitimacy' (whatever that is).
- b. The need for on-going enforcement of change.
- c. The complex relationship between liberal democracy and elite deals.
- d. The pressure for accountability of international interveners.
- e. The lack of experience of international actors in dealing with institutional development as a 'battleground' whereby each party uses reform to try to win through the peace, what they did not win through the war.
- f. Lack of integration of economic transition factors. Development and reconstruction of governance institutions may cut across economic adjustment imperatives, because they require large amounts of public expenditure.

8. Some important counter-intuitive pointers as to effective intervention to support law and governance structures post-conflict. There are many lessons which could and have been drawn for those seeking to intervene effectively in structured transitions from conflict so as to support good law and government. We have chosen just a few that we view as

sound but counter-intuitive to the normal ways in which international interveners tend to work.

- a. Economic adjustment must often be secondary to legal and political reconstruction
- b. International enforcement remains necessary to all progress, and progress is slow. In particular, international interveners should analyse where spoilers may come from, and anticipate how best to support those committed to the peace settlement to deal with them.
- c. It can be useful to live with mess, such as overlapping institutional provision, without trying to rationalise for rationalisation sake, as this provision may be vital to keeping one of the parties 'on board'
- d. It is important that international interveners understand and anticipate the way in which governance reform will itself be a battlefield between the parties – good post-conflict analysis of how different proposed reforms are understood to impact on each side's calculation of its zero-sum interests.
- e. It is important for international interveners to understand the limits of their own political constraints, and not to take on tasks which are going to be political and even confrontational, if they do not have the requisite political will or resources to complete these tasks.
- f. However, while interveners need to understand the political constraints of the local context, and of their own capacity, they should not always accept such constraints. Effective intervention will look for opportunities to move beyond the political constraints to support institutional transformation.
- g. International actors should be understanding of civil society post-conflict collapse – it is normal and structural, as actors move in and out of official institutions, and funding sources dry up. Proactive support to civil society should be considered as a post-conflict necessity.
- h. Redistributive economic policies based on achieving inter-group equality are important to success, and often achieved by a combination of targeted strategies, and by concentrating on rich – poor inequalities which disproportionately help marginalised groups without targeting them to specific identities

Appendix: Annotated Bibliography

Useful select consortium past and current work relating to law and governance questions (See further www.politicalsettlements.org/research for latest publications)

Complex relationship between legal institutions, governance institutions and elite political bargaining during and post-conflict

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- O'Rourke, Catherine (2013) *Gender Politics in Transitional Justice* (Routledge)
- O'Rourke, Catherine (2015) Briefing Paper 5, Political Settlements Research Programme at <http://www.politicalsettlements.org/research/briefing-notes/>
- Conciliation Resources, Accord on Legitimacy and peace processes, <http://www.c-r.org/accord/legitimacy-and-peace-processes/what-legitimacy-and-why-does-it-matter-peace>

See also case studies on

- Somalia (constitutions): <http://www.c-r.org/accord/legitimacy-and-peace-processes/somalia-legitimacy-provisional-constitution>
- Yemen (national dialogue): <http://www.c-r.org/accord/legitimacy-and-peace-processes/yemen-national-dialogue-conference-managing-peaceful-change>
- Afghanistan (local governance and political settlement): <http://www.c-r.org/accord/legitimacy-and-peace-processes/afghanistan-local-governance-national-reconciliation-and>
- Fiji (women's empowerment vis a vis the constitutional reform process). This last is taken from CR Accord on cross-border peacebuilding and looks at civil society attempts to improve security and trade governance in the MRU: <http://www.c-r.org/accord/legitimacy-and-peace-processes/fiji-constitutional-process-view-fiji-women-s-rights-movement>
- Borderlands and political settlement: <http://www.c-r.org/accord-article/security-governance-mano-river-borderlands>

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